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No. 88-1513

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALFRED P. CHRISTOFFERSEN, ET AL., PETITIONERS

v.

ROBERT J. COLLINS, MAJOR GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below, which applied the standards for review of military decisions set forth in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), correctly declined to review the propriety of petitioners' discharge from the Washington Air National Guard.

2. Whether the Air National Guard regulation pursuant to which petitioners were discharged was lawfully promulgated.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-44) is reported at 855 F.2d 1437. The opinions of the district court (Pet. App. 1-12, 13-23) are unreported.

JURISDICTION

The opinion of the court of appeals was filed on August 31, 1988, and an order denying rehearing was filed on December 15, 1988 (Pet. App. 45). The judgment of the court of appeals (Pet. App. 46) was entered on December 27, 1988. The petition for a writ of certiorari was filed on March 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Alfred Christoffersen, William Gibson, Richard Main, and John Warn were officers in the Washington Air National Guard (WANG); all were Lieutenant Colonels except Gibson, who was a Colonel. They were also civilian technicians, a position that made them federal employees under the National Guard Technicians Act of 1968, 32 U.S.C. 709. Technicians must maintain their membership in the National Guard to retain their civil service positions. 32 U.S.C. 709(b).

In 1977 the Air National Guard established a "vitalization program" under which officers who have more than 20 years of military service are reviewed for retention or separation from the Guard. Air National Guard Regulation (ANGR) 36-06 (Pet. App. 59-70). An Advisory Board reviews those officers to determine whether their retention is consistent with "assuring a viable combat ready military unit in future years." ANGR 36-06 para. 10e(10) (Pet. App. 67). The Advisory Board's recommendation is not binding, and any particular recommendation may be approved or disapproved by the state Adjutant General. *Id.* at para. 11b (Pet. App. 68).

The petitioners were recommended for retention by an Advisory Board in 1978, but were disapproved by their Adjutant General, respondent Major General Robert Collins. They therefore were discharged from WANG and transferred to the United States Air Force Reserve. As a result of their discharge from WANG, petitioners lost their employment as civilian federal technicians.

2. Petitioners first brought suit in the Court of Claims, which concluded that they had failed to state a claim upon which it could grant relief. Pet. App. 55. Petitioners then brought this suit in district court under 42 U.S.C. 1983, alleging that various National Guard offi-

cials had violated their rights under the First and Fourteenth Amendments. More specifically, petitioners contended that their constitutional rights had been infringed because Adjutant General Collins had decided not to retain them in retaliation for an incident that had occurred in 1974. At that time petitioner Main was in charge of implementing a nuclear weapons safety program, and he temporarily disqualified two officers, who he suspected were involved in drug trafficking, from participating in nuclear missions. WANG failed to inform the Air Force about the temporary disqualification while Collins was trying to countermand it. In the interim, Main and his assistant, petitioner Christoffersen, called the matter to the attention of the Inspector General of the Air National Guard. Shortly thereafter, all nuclear weapons were removed from WANG's control and, subsequently, from National Guard units nationwide. Petitioner Warn sat on an investigatory board that sustained the actions of Main and Christoffersen, while petitioner Gibson, their superior, supported Main and Christoffersen and gave them outstanding ratings following the incident. Pet. App. 26-28.

Petitioners also contended that ANGR 36-06 had been improperly promulgated. Various federal parties were named as defendants "both to interpret this * * * regulation and provide relief to petitioners as Technicians." Pet. 19.

The district court doubted whether, under *Chappell* v. *Wallace*, 462 U.S. 296 (1983), military superiors were ever subject to suit under Section 1983. Pet. App. 4. Alternatively, it applied the test set forth in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). As the court explained: "*Mindes* allows judicial review of internal military affairs only where there are allegations of deprivations of constitutional rights or that the military acted in contravention of its own statutes or regulations. The factors [to be weighed

if the threshold conditions are satisfied] are: (1) the nature and strength of the claim; (2) the potential injury to plaintiff if review is refused; (3) the extent of interference with military functions; (4) the extent to which military discretion or expertise is involved." Pet. App. 4-5. Describing petitioner's First Amendment claims as "tenuous," the court concluded that "it would be inappropriate to intervene in this area of military affairs." *Id.* at 6.

The district court then upheld the validity of ANGR 36-06. It first concluded that the Secretary of the Air Force had authority to promulgate the regulation, thus rejecting petitioners' contention that only the Secretary of Defense could promulgate it because it governs National Guard technicians. See National Guard Technicians Act of 1968, Pub. L. No. 90-486, § 10, 82 Stat. 760, 32 U.S.C. 709 note. The court agreed with the government that "ANGR 36-06 must be characterized as a military personnel regulation rather than a technician regulation * * * [because] the class of military officers affected by the regulations is much broader than the included sub-class of technicians." Pet. App. 19. It then determined, contrary to petitioners' contentions, that the Secretary of the Air Force had delegated his authority to promulgate the regulation to his Chief of Staff and that the Chief of Staff had, in fact, approved it. *Id.* at 19-22.

3. The court of appeals affirmed. Pet. App. 24-44. It applied the *Mindes* test and, like the district court, found petitioners' claims unreviewable. After determining that petitioners had satisfied the threshold conditions of the test, the court addressed each of its four factors. The court first found that petitioners were not "whistleblow[ers]." Rather, Main and Christoffersen had merely exercised their military authority by temporarily disqualifying the two officers suspected of drug trafficking. Warn, as a member of the investigatory board, and Gibson, as unit

commander, had also merely exercised their military authority in supporting Main and Christoffersen. Pet. App. 35-36. In addition, the court determined that petitioners had no property interest in their membership in the National Guard. *Id.* at 37-38. Accordingly, the court determined that the first factor of the *Mindes* test—the nature and strength of the plaintiffs' claim—did not favor review.

The court found that the second factor—the potential injury to the plaintiffs if review is refused—"tips but not strongly, in [petitioners'] favor." Pet. App. 39. The court noted that although the Air Force Board for Correction of Military Records could reinstate the petitioners in active reserve status and order back pay, it could not order reinstatement in WANG.

The court next concluded that the third and fourth factors—the extent of interference with military functions and the extent to which military discretion or expertise is involved—"weigh heavily against reviewability of the challenged nonretention decisions." Pet. App. 41. In so finding, the court stated that the vitalization program would be "significantly impaired" if courts routinely entertained challenges to nonretention decisions. *Id.* at 39. It further stated that a trial court could not reach a judgment here "without exposing itself to all the pros and cons of the nonretention decisions" at issue. *Id.* at 40. "On balance," the court held, "the *Mindes* factors weigh against reviewability of [petitioners'] constitutional claims." *Id.* at 41.

The court of appeals also dismissed petitioners' challenges to ANGR 36-06. The regulation is not contrary to the National Guard Technicians Act, the court explained, because "the Act permits, but does not require, retention of technicians, and does not limit the authority of state National Guards to make retirement decisions." Pet. App. 42. Nor was there merit to petitioners' conten-

tion that the regulation is unlawful because the Secretary of Defense had not promulgated it: the court concluded that the Secretary of the Air Force had the authority to promulgate the regulation; that he properly had delegated that authority, and that the regulation had been approved. *Id.* at 42-43.

ARGUMENT

1. Petitioners contend that the court of appeals' holding that their claims are not reviewable under the *Mindes* test should be reviewed because it conflicts with (a) a district court decision; (b) a prior decision of the Court of Claims in this case; and (c) another decision of the court below. There is no merit to those contentions, and review by this Court is not warranted.

Petitioners' principal contention ~~argue~~ (Pet. 19-20) is that the decision below conflicts with the decision of the United States District Court for the Western District of Pennsylvania in *Bollen* v. *National Guard Bureau*, 449 F. Supp. 343 (1978). Of course, review by this Court is not warranted because a court of appeals has disagreed with a district court. In any event, there is no conflict. Rather, the district court's vacation of a nonretention decision in *Bollen* resulted from its different facts. Most significantly, the court found that the plaintiff there had a property interest in his employment. *Id.* at 350. The court based its conclusion on the fact that the plaintiff in *Bollen* had obtained a letter from his Adjutant General promising that he would be retained to age 60. *Ibid.* In addition, the plaintiff had been promised continued employment as the result of the settlement of a prior lawsuit. *Id.* at 348. No such unique circumstances exist here, and the courts below therefore correctly concluded (as have all other courts of appeals that have considered similar claims) that peti-

tioners had no property interest in their positions. Pet. App. 37, citing *Navas* v. *Gonzalez Vales*, 752 F.2d 765, 768 (1st Cir. 1985); *Penagaricano* v. *Llenza*, 747 F.2d 55, 62 (1st Cir. 1984); and *Walker* v. *Alexander*, 569 F.2d 291, 294 (5th Cir. 1978).

Nor is there merit to petitioners' claim (Pet. 21-22) that review is warranted because a statement by the court of appeals conflicts with a prior decision of the Court of Claims in this case. The statement in question is that petitioners might obtain partial relief from the Air Force Board for Correction of Military Records. Pet. App. 39. Such Boards, which consist of civilians appointed by the Secretary of each branch of the armed forces, have broad authority "to correct an error or remove an injustice." 10 U.S.C. 1552(a). In an appropriate case, they may order reinstatement and back pay. 10 U.S.C. 1552(c). "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. at 303. Contrary to petitioners' contention (Pet. 21-22), their inability to bring an original action in the Court of Claims in no way negates their right to seek relief from the Board. Indeed, they should have sought relief through the administrative avenue that Congress has provided rather than suing under the Tucker Act, 28 U.S.C. 1491, and Section 1983.

Petitioners also err in asserting (Pet. 22) that the Ninth Circuit's decision here conflicts with its decision in *Sebra* v. *Neville*, 801 F.2d 1135 (1986). The court there, as here, analyzed the claim of the plaintiff, a member of the California National Guard, under the *Mindes* test, and concluded that it was not justiciable. *Id.* at 1142. Moreover, an intracircuit conflict would not in any event warrant review by this Court.

2. Petitioners' contentions with respect to ANGR 36-06 (Pet. 24-25) do not warrant review. The courts below correctly rejected petitioners' fact-bound arguments for the reasons stated in their opinions. In addition, petitioners allege no conflict in the courts of appeals with respect to the validity of the regulation, and there is none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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